IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/07/2004

CORAM

THE HON'BLE MR.JUSTICE P.D. DINAKARAN
AND
THE HON'BLE MR.JUSTICE N. KANNADASAN

Original Side Appeal No.41 of 2004

1. The Superintending Engineer
(Highways and Rural Works)
76/2, Sardar Patel Road
Guindy, Chennai-25.

2. The Superintending Engineer
(Highways and rural works)
Villupuram Circle
Villupuram 605 602. .. Appellants

-Vs-

1. D.G. Deivasigamani
2. Mr.Justice G. Ramanujam .. Respondents

Appeal against the order dated 24.12.2003 made in O.P.No.780 of 2003
on the file of this Court.

!For Appellants : Ms. Thatchayini
For Mr.M.C. Swamy, Spl.G.P.

^For Respondents : Mr.B.T. Seshadri

:J U D G M E N T

Judgment of the Court was delivered by
P.D. DINAKARAN, J.
This appeal is directed against the order dated 24.12.2003 made in O.P.No.780 of 2003 preferred by the appellant herein under Section 34 of the Arbitration and Conciliation Act (in short the "Act"), to set aside the award dated 9.4.2003 passed by the second respondent arbitrator in AC No.3 of 2001, ordering notice on condition that the appellant should deposit a sum of Rs.50 lakhs within a period of eight weeks.

2.1. The right to file an application under Section 34 of the Act to set aside the award is statutory and the same is unconditional and unqualified as evident from the language of Section 34 of the Act, which reads as follows:

"Section 34: Application for setting aside arbitral award.-

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if -

(a)the party making the application furnishes proof that -

(i) a party was under some incapacity, or

(ii)the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii)the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that -

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral

tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

2.2. Section 34(4) of the Act makes it clear that on receipt of the application under sub-section (1) of Section 34, the Court may, where it is appropriate, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

2.3. Apart from the above procedure, no other qualification is provided under the Act for setting aside the arbitral award under Section 34 of the Act, except the limitation of time imposed under Section 34 (3) of the Act.

3.1. In this regard, it is apt to refer Section 36 of the Act, which reads as under:
" Section 36: Enforcement.- Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application

having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

3.2. Section 36 of the Act makes it clear that where the time for making an application to set aside the arbitral award under Section 34 of the Act has expired or such application having been made and it has been refused, the award shall be enforced by the Code of Civil Procedure.

4.1. A reading of Section 34 and 36 of the Act harmoniously makes it clear that once a notice is admissible, the arbitral award becomes unexecutable, as held by the Apex Court in NATIONAL ALUMINIUM CO. LTD. v. PRESSTEEL & FABRICATIONS PVT. LTD. (2004 (1) CTC 141), as follows:
" .. the mandatory language of Section 34 of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the Court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein. Therefore, that being the legislative intent, any direction from us contrary to that, also becomes impermissible."

4.2. In NATIONAL ALUMINIUM CO. LTD. case cited supra, the Apex Court has further held that the automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the Court to put up the parties on terms, in our opinion, defeats the very objection of the alternate dispute resolution system to which arbitration belongs.

4.3. The condition imposed by the learned single Judge requiring the appellant to deposit a sum of Rs.50 lakhs while ordering notice on the application filed by the appellant under Section 34 of the Act to set aside the award dated 9.4.2003 made in AC No.3 of 2001, therefore, in our considered opinion, is without jurisdiction.

5. For the reasons aforementioned, we are inclined to interfere with the order of the learned single Judge and set aside the condition imposed in the order dated 24.12.2003 requiring the appellant to deposit Rs.50 lakhs within eight weeks and remit the matter to the learned single Judge to proceed further in the matter, in accordance with law.

6. The parties are at liberty to request the learned single Judge for expeditious disposal, if they are so advised.

The appeal is allowed. CMP No.2744 of 2004 is closed.

Index : Yes
Internet : Yes

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